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No. 591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

NELSON-RYAN FLIGHT SERVICE, INC.,
Petitioner

v.

LORRAINE M. LANGE, individually and
LORRAINE M. LANGE, *Trustee*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court, of the United States.

Your petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota entered in the above cause on August 14, 1962.

OPINIONS BELOW

The memorandum opinion of the District Court for Hennepin County, Minnesota (I R. 311-317;[1] App. A, *infra*, p.

[1] The references are as follows:
"I R.—" —the printed record on the first appeal.
"II R.—" —the supplemental printed record on the first appeal.
"III R.—" —the printed record on the second appeal.
"IV R.—" —the printed petition for reargument on the second appeal.
"V R.—" the proceedings in the Supreme Court of Minnesota on both appeals.

1a) is not officially reported. The opinion of the Supreme Court of Minnesota on the first appeal, by respondent (V R. 4-13; App. B, *infra*, p. 7a) is reported at 259 Minn. 460, 108 N.W. 2d 428 (March 3, 1961). The opinion of the Supreme Court of Minnesota on the second appeal, by petitioner (V R. 15-19; App. C, *infra*, p. 18a) not yet officially reported, is reported in 116 N.W. 2d 266.

JURISDICTION

The judgment of the Minnesota Supreme Court reversing the trial court's order granting petitioner's motion for judgment notwithstanding the verdict was entered on April 26, 1961 (V R. 24; App. B, *infra*, p. 24a).[2] Final judgment of the Supreme Court of Minnesota affirming the trial court's order denying the defendant's motion for new trial was entered August 14, 1962 (V R. 25; App. C, *infra*, p. 17a-18a).[2] Order denying petitioner's petition for reargument had been earlier enterd on July 30, 1962 (V R. 23). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether, in an action for wrongful death of plaintiff's decedent—a professional commerical pilot and flight instructor, in a crash during a routine check flight, in petitioner's dual control tandem trainer-type rental aircraft of the same type as that in which plaintiff's decedent had received much of his instruction and had instructed a number of students himself, made to verify decedent's pro-

[2] Under Rule XIV of the Supreme Court of Minnesota no judgment could be entered until at least ten days after the opinion filed June 5, 1962 (App. C, *infra*, p. 18a). Under Rule XX of that Court the filing of the petition for reargument stayed entry of judgment until filing of the order of denial thereof on July 30, 1962 (V R. 23). The judgment was not entered until August 14, 1962 (V R. 25). The peculiarities of the Minnesota practice require care to assure of finality (Cf. *Fox Film Corp.* v. *Muller*, 294 U.S. 696; 296 U.S. 207, 209).

ficiency in its operation preliminary to its release to him on rental for solo flight in accordance with standard procedures for such verification recommended by the Civil Aeronautics Administration, the crash being also fatal to petitioner's check pilot, where there is no allegation or evidence of violation of Civil Air Regulations, and where the evidence most favorable to plaintiff permits the inference that the accident occurred as a result of negligent operation of the aircraft during the flight but negatives any other cause, and is under state law insufficient, in the opinion of both the state district court and the state supreme court, to afford a basis for inference as to which pilot had been negligent—

Whether, the state supreme court erred in holding that, under such circumstances § 60.2 of the air traffic rules, Civil Air Regulations (14 C.F.R. § 60.2) applies to take the place of evidence and make the check pilot, as the "pilot in command", negligent as a matter of Federal law if there was negligence on the part of anyone in operation of the aircraft, even though the sole negligence may have been that of the renter pilot, plaintiff's decedent.

STATUTE AND REGULATIONS INVOLVED

Civil Air Regulations, Part 60, "Air Traffic Rules", promulgated September 13, 1955, by the Civil Aeronautics Board (20 Fed. Reg. 6694) under authority of the Civil Aeronautics Act of 1938, Act of June 23, 1938, c. 601, sec. 205, 52 Stat. 973, 984, as amended, 49 U.S.C. § 425,[3] in pertinent part provides (14 C.F.R. §§ 60.1, 60.2 (Rev. 1956)):

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[3] The Federal Aviation Act of 1958 repealed the Civil Aeronautics Act of 1938 (Act of August 23, 1958, sec. 1401(b), 72 Stat. 731, 806) but continued the Civil Air Regulations in effect (id., sec. 1501(a), 72 Stat. 809). The regulations here involved appear without change in 14 C.F.R. §§ 60.1, 60.2 (Rev. Jan. 1, 1962).

"PART 60—AIR TRAFFIC RULES

"§ 60.1 *Scope.* The air traffic rules in this part shall apply to aircraft operated anywhere in the United States, including the several states. . . .

"§ 60.2 *Authority of the pilot.* The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft. In emergency situations which require immediate decision and action the pilot may deviate from the rules prescribed in this part to the extent required by consideration of safety. . . ."

STATEMENT

Respondent, suing as court-appointed trustee under the wrongful death statute of Minnesota, brought this action naming petitioner as defendant in the District Court for Hennepin County, Minnesota. The first count of her amended complaint alleged that her decedent husband, while an occupant of an aircraft owned by petitioner, was killed as a result of defendant's having, through its check pilot Percy, "negligently operated said aircraft" so as to cause it to crash[1] (1 R. 9-10). Petitioner's answer denied negligence, and pleaded contributory negligence and assumption of risk (1 R. 12-14).

After trial and verdict for plaintiff, the trial court, on the ground that the verdict was based on speculation and conjecture, granted defendant's motion for judgment notwithstanding the verdict (1 R. 307; App. A. *infra*, p. 6a) and denied defendant's alternative motion for new trial "if the order granting defendant's motion for judgment notwithstanding the verdict is reversed . . ." (1 R. 309-310, App. A. *infra*, p. 7a).

The Supreme Court of Minnesota reversed, solely on the ground that Civil Air Regulation § 60.2, injected into the

[1] On a second count, the trial court granted summary judgment for defendant (1 R. 15) and no appeal was taken therefrom.

case for the first time by that Court, made defendant's check pilot, regardless of whether he was at the controls, negligent as a matter of law if there was negligence in the operation of the plane (V R. 4-13; App. B, *infra*, p. 7a et seq.). Petitioner raised the federal question by petition for reargument challenging this construction and application of the federal regulation (III R. 128, 129, 164-166). Petition for reargument was denied April 26, 1961 (V R. 22); judgment of reversal was entered the same day (V R. 24; App. B, *infra*, p. 17a).

Petitioner then filed notice of appeal from the trial court's order denying motion for new trial (III R. 168) still urging the federal question. On June 29, 1962, after argument, the Supreme Court of Minnesota filed its opinion affirming the trial court's denial of motion for new trial (V R. 15-20; App. C, *infra*, pp. 18a-24a). It recognized that petitioner had again urged the federal question of construction and application of the Civil Air Regulation § 60.2 (App. C, *infra*, pp. 19a-20a) but adhered to its prior opinion as establishing the law of the case[5] (id., *infra*, pp. 21a-23a). On July 30, 1962, petitioner's petition for reargument (IV R.) was denied (V R. 23). Judgment affirming the trial court's order denying motion for new trial was entered August 14, 1962 (V R. 25; App. C, *infra*, p. 25a).

There is no dispute as to the facts. The record discloses no substantial conflict in the evidence and no question of fact is involved. Indeed, there is no questioning by the

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[5] Two of the seven judges dissented (V R. 14; App. B, *infra*, p. 17a).

[6] It is not irrelevant to note that of the seven judges of the state supreme court, Gallagher, J., and Knutson, C.J., adhered to their prior dissent holding the verdict based on speculation (V R. 21). More significantly, Otis, J., a new judge, noted his disagreement with the law of the case and concurred only because he thought fortuitous change in personnel "should not unsettle adjudicated rights."

petitioner of the holdings of the trial court and the supreme court of the state as to the inferences of facts most favorable to the plaintiff that find basis in the record.

The memorandum opinion of the state district court (I R. 311-317; App. A, *infra*, pp. 1a-5a) and the first opinion of the Supereme Court (V R. 4-13; App. B, *infra*, pp. 8a-17a) fairly summarize the evidence and the inferences most favorable to the plaintiff that properly may be drawn therefrom.

On September 30, 1957, petitioner, being then engaged, inter alia, in the business of renting aircraft for operation by renting pilots, rented one of its eight small high wing single engine, tandem, two-place Champion 7 AC Tri-Traveler aircraft to respondent's decedent, Wesley Lange (I R. 163; App. B, *infra*, p. 8a). Lange carried a currently valid airman's certificate issued by the Civil Aeronautics Administration with commercial and instructor ratings and with a medical waiver (I R. 160). He had been flying for approximately 12 years (II R. 20) largely in a Piper Cub and an Aeronca (II R. 22; I R 159). He had operated his own flight training school (II R. 23). He had also been employed as a pilot and flight instructor by the University of Minnesota (II R. 23) and in that capacity had flown officials on trips, "chased balloons" and instructed a number of student pilots (II R. 23, 24). As a test pilot for Cedar Engineering, he had flown officials on long trips and had made flight tests of automatic controls manufactured by that company (II R. 15, 25). For the past 3½ years all his income had been earned as a professional commercial pilot except for the last five weeks immediately antedating his death. During this last short period he had been employed by the Minneapolis-St. Paul Metropolitan Airports Commission as a non-flying supervisor of the Flying Cloud Airport southwest of Minneapolis, with his office in the same building occupied by the petitioner, Nelson-Ryan Flight Service, Inc. (II R. 17, 26).

Petitioner, to protect its rental plans from damage, required that any renter pilot, regardless of his prior experience or ratings, coming to rent one of its aircraft for the first time, must take a check-out flight with one of its pilots in the aircraft to be rented, in order to assure of the renting pilot's proficiency (I R. 104-106, 165-166, 274-275; II R. 39, 40) This normally could be determined after two or three take-offs and landings (I R. 45, 105; II R. 27, 28). This procedure was recommended by the Civil Aeronautics Administration (I R. 194) and was customarily followed in the aircraft rental business (I R. 192).

Lange took his check flight with Ronald Percy, an employee of petitioner, who also held commercial and flight instructor ratings, and who served petitioner as a charter flight pilot and as a flight instructor as well as check pilot (I R. 43, 103-104).

The aircraft used in the check flight was a Champion 7 AC Tri-Traveler, a tandem type, high wing, two-place aircraft having duplicate controls (I R. 108, 110, 111) but the parking brake and engine starter switch could only be reached from the front cockpit and the aircraft was ordinarily flown from the front seat (I R. 108, 126). The controls were the same as, and the flight characteristics were very similar to, those of the Piper Cub (R. 101, 163), aircraft of another manufacturer in which Lange had received much of his flight instruction (Def. Ex. 3, 4, 5). Lange had been the owner of a Piper Cub (II R. 20) and had used one in the giving of flight instructions (II R. 22).

A dispatch sheet of the petitioner company indicated that the check flight left the airport at approximately 10:30 a.m. and a stopped watch indicated the crash occurred at 10:36 a.m. The crashed aircraft was discovered shortly before 11 a.m. standing directly on its nose at a point beneath the approximate point where an aircraft of this type would be expected to make its turn for final approach to the runway in use that day (I R. 27, 53, 57, 251, 252). There were no

known eye-witnesses of the events immediately preceding the flight, of the actual flight, of the fall of the aircraft, or of the collision with the ground (I R. 253).

The position of the bodies established that Lange occupied the front seat and Percy the rear seat (I R. 57, 255). This conformed with the custom at Nelson-Ryan company for the pilot to be checked out to occupy the seat from which the aircraft was normally flown (I R. 108) with the check pilot in the rear (I R. 168). Lange was dead on discovery of the aircraft and Percy was dead on arrival at the hospital without regaining consciousness (I R. 57, 58, 257).

The position of the plane permitted an inference that the impact with the ground was preceded by one-half turn of a spin following a stall while the aircraft was in a left turn at an altitude of less than 600 feet.

On the day of the accident the weather was calm. Visibility was 15 miles and the ceiling unlimited. There was light normal turbulence and only a very remote chance of thermal-convection currents in the area where the crash occurred. (I R. 233, 260) The evidence was clear that there was no malfunction of the plane. The controls were functioning properly even after the crash. It was stipulated that there was no evidence of mechanical failure as causing or contributing to the crash and the jury was so instructed. (I R. 56, 245, 246, 247).

Pursuant to stipulation, instruction as to *res ipsa loquitur* was withheld from the jury (I R. 278, 279) but the court did read to the jury the definition of "pilot in command" as set forth in § 43.70 of Part 43 "General Operation Rules" of the C.A.B.'s Civil Air Regulations (14 C.F.R. § 43.70).[7]

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[7] This regulation provides:

"As used in this part terms shall be defined as follows:

. . . . . .

"*Pilot in command.* Pilot in command shall mean the pilot responsible for the operation and safety of the aircraft during the time defined as flight time."

Trial court decision.—After trial and verdict for the plaintiff, upon petitioner's motion for judgment notwithstanding the verdict or, in the alternative, for new trial (1 R. 307), the trial court filed a memorandum opinion granting the motion for judgment notwithstanding the verdict (1 R. 311-317; App., A, infra, pp. 1a-5a). In brief, it held that the jury could infer that Lange was piloting the plane at take-off and that Percy, defendant's employee was at the controls at the time of the crash. The jury could infer that the plane stalled in a 90-degree left turn while entering into the final leg for a landing and had spun either 180 degrees left or right before crashing. But the jury could not infer that Percy took over the controls before the stall and spin rather than after, because the two inferences were equally supported by the proof and choice between them entirely speculative. Indeed, it said, the inference that he took over the controls after the stall and spin developed was supported by the greater probability (*id.*, p. 3a).

It held that if Mr. Percy took over after stall and spin developed, the negligence of plaintiff's decedent was at least a contributing proximate cause and might be deemed the sole proximate cause because there was not sufficient altitude for spin recovery (*id.*, p. 3a).

If Percy had a duty to see that the plane did not get into a dangerous attitude, Lange had the same duty while he was piloting and his negligence would be primary. Therefore, if Percy was negligent for breach of duty to see the plane did not get into a dangerous attitude while Lange was piloting, contributory negligence of Lange would be a necessary corollary (*id.*, p. 4a).

The trial court also said (*id.*, p. 4a) the jury could infer that Lange approached the turn at such slow speed that Percy should have known the plane would stall but it could infer with equal logic that the stall resulted from too steep a bank and Percy could not be charged with negligence in failing to anticipate too steep a bank.

For these reasons the court concluded the verdict was based on speculation and conjecture (1 R. 315; App. A, *infra*, p. 4a). Accordingly, the trial court entered its order: (1) granting petitioner's motion for judgment notwithstanding the verdict; and (2) denying the motion for new trial "if the order granting defendant's motion for judgment notwithstanding the verdict is reversed, vacated or set aside" (1 R. 309-310; App. A, infra, pp. 6a-7a).

Respondent's appeal to state supreme court. The respondent appealed from the order for judgment notwithstanding the verdict as is permitted under the Minnesota practice (1 R. 317). After argument, the Supreme Court of Minnesota (2 judges dissenting) filed its opinion March 3, 1961, holding the order of the trial court should be reversed (V R. 4-13; App. B, infra, pp. 7a et seq.). The opinion follows the trial court in holding that the evidence most favorable to plaintiff justified inference that the accident was caused by negligence of one or the other of the two pilots but made the question of whether Percy took over the controls before or after the disastrous maneuver a matter of pure conjecture (*id.*, p. 12a-13a).

However, the opinion purports to supply the gap, found fatal to plaintiff by the trial court, by holding that defendant's employee was a flight instructor and was as such the "pilot in command" of the aircraft throughout the flight,

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The court also stated that plaintiff's decedent, despite the fact he held commercial and instructor ratings, was only a trainee to whom petitioner owed the high duty of care of a carrier (App. B, *infra*, p. 13a). This on authority of a single decision (*Loram v. Murphy*, 360 Mo. 1140, 232 S.W. 2d 937) where the student pilot, unauthorized to pilot with passengers, was shanghaied by an instructor who arbitrarily took over the controls and so far deviated from the purpose of the flight as to go on a wild cross-country "buzzing" expedition ending it in a crash and injury of the student pilot. There the student pilot was unauthorized to pilot passengers and was admittedly under instruction. Here, Lange had as high ratings as Percy and could have acted as pilot in command at any time by taking over the functions of "pilot in command."

With this premise, probably erroneous, it then injected into the case for the first time Section 60.2 of the Air Traffic Rules of the Civil Air Regulations and construed it to make the "pilot in command" negligent as a matter of law. Relying solely on the language of this Regulation (60.2), it said (App. B, *infra*, pp. 14a-15a):

> "Thus, the rule applicable to aircraft is that if the aircraft is operated in a negligent manner the pilot in command is negligent regardless of whether or not he is at the controls at the time, at least in the absence of extenuating circumstances such as sudden illness."

It added (*id.*, pp. 15a-16a):

> "The evidence in the instant case is clear and uncontroverted that on a checkout flight even of a commercial pilot, the pilot being checked out assumes a trainee status and the flight instructor is the pilot in command."

The point is irrelevant in any event since there was still the admitted lack of any evidence on which to base inference of breach of duty by the check pilot — whether the standard of care measuring his duty was the "highest degree of care" as a carrier, or otherwise.

The opinion pointedly refrained from holding that *res ipsa loquitur* was applicable (App. B, *infra*, p. 12a). As noted above (p. 8, *supra*), by stipulation the jury was not instructed on *res ipsa loquitur*. Since neither petitioner nor its agent was in exclusive control at the time of the negligent operation that caused the injury, the rule was by its terms clearly inapplicable under the state law. *Risberg* v. *Duluth W. & P. Ry. Co.*, 233 Minn. 296, 47 N.W. 2d 119; *Barnes* v. *Northwest Air Lines, Inc.*, 233 Minn. 410, 47 N.W. 2d 180, 191; *Northwest Airlines* v. *Rowe*, 226 F. 2d 365, 370 (8th Cir. 1955). In any event, since the opinion in such plain terms posits decision on the court's determination of the effect and meaning of the Federal regulation, no consideration could here be given to the contention, if made, that the state court might, consistently with the record, have based its decision upon *res ipsa loquitur* as an independent and adequate state ground. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Virginian Ry. Co.* v. *Imperial Coal Sales Co.*, 266 U.S. 15, 16-17; *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98.

And it concluded (*id.*, p. 16a):

> "Consequently if there was negligence in the operation of the plane, it was proper for the jury to find the flight instructor, Perey, as the pilot in command, responsible for the negligence and therefore to hold the defendant liable."

In rejecting petitioner's contention that plaintiff's decedent was guilty of contributory negligence, the Court reiterated (*id.*, p. 16a):

> "... there was no evidence from which the jury could reasonably infer which of the two men in the plane was actually operating the controls at the time that the fatal fault occurred."

It then emphasized the pivotal effect given to its construction of the Federal regulation by saying (*id.*, p. 16a):

> "However, by the rules of law applicable to air traffic, we are able to determine that the pilot in command was responsible for the negligence in any event, and regardless of whether or not he was in actual operation of the controls at the time. No such principle is applicable to the person being carried as a passenger regardless of whether or not he was an unlicensed trainee or a pilot on a checkout flight. * * *
>
> It is enough that the evidence affords an evidentiary basis for an inference that the plane was negligently operated and that by the applicable regulations and rules of law, the pilot in command may be held responsible for negligent operation of the plane."

The opinion concluded that judgment should have been entered on the verdict (*id.*, p. 17a).

Petitioner, at its earliest opportunity, and by petition for reargument, raised the federal question thus originated by the action of the state supreme court in invoking for the first time, and construing, the Civil Air Regulation § 60.2. Petitioner, in its petition for reargument (III R. 128), pointing out that the meaning of the section had been

neither briefed nor argued by the parties (III R. 126) urged that the C.A.B. in the enforcement of this, its own regulation, contrary to the state court's construction, requires substantial, reliable and probative evidence to hold the pilot in command guilty of negligence (III R. 148) and the court's interpretation goes well beyond any known interpretation of the Act (III R. 166). On April 26, 1961 the petition for reargument was denied and judgment of reversal entered for plaintiff (V R. 22, 24; App. B, *infra*, pp. 17a-18a).

Petitioner's appeal to state supreme court.—That part of the order of the trial court conditionally denying petitioner's motion for new trial (App. A, *infra*, pp. 6a-7a) became effective upon entry of the judgment of reversal by the supreme court of the state. Petitioner thereupon filed notice of appeal (III R. 168) from the order denying its motion for new trial. Upon briefs and oral argument, the state supreme court, on June 29, 1962, filed its opinion, based principally on adherence to the law of the case, affirming the order of the trial court denying motion for new trial (V R. 15-20; App. C, *infra*, pp. 18a-24a). The opinion shows that petitioner reiterated its contention, made in its prior petition for reargument on the first appeal, that the court had wrongly construed and applied the federal Civil Air Regulation as constituting the rule of law upon which it relies (App. C, infra, p. 20a). Petitioner's petition for reargument (IV R.) attempted to obtain even more definite showing that the Federal question had been raised and considered by the court but was denied July 30, 1962 (V R. 23).

Final judgment affirming the order of the trial court denying motion for new trial was entered August 14, 1962 (V R. 25; App. C, *infra*, p. 25a).

REASONS FOR GRANTING THE WRIT

1. *The federal question here presented was properly raised and preserved in the state courts.*—Where, as here,

the petitioner in the state court insisted on a construction of the federal regulation, promulgated under authority of a federal statute, which construction would lead to judgment in its favor, a federal question is involved. *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281, 293; *Moore v. C. & O. Ry. Co.*, 291 U.S. 205, 215; *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483. After the state supreme court, sua sponte, on the first appeal, for the first time and without brief or argument by the parties, injected into the case Civil Air Regulation § 60.2, petitioner's petition for reargument (III R. 128) immediately and timely raised the federal question by challenging the court's construction of the regulation (III R. 129, 141, 147-148, 155-156, 159, 164-166). On appeal from the trial court's denial of motion for new trial, petitioner in its brief again attacked the supreme court's construction and application of the federal regulation, as is clearly reflected in the second opinion of the state supreme court (App. C, infra, p. 20a). Petitioner's petition for reargument on the second appeal was largely an effort to obtain an even clearer record as to the Federal question decided (IV R.). That the Minnesota supreme court, on the second appeal, held itself bound by the "law of the case," of course, cannot bar this Court's consideration of the federal question raised and decided on the first appeal. *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319; *Urie v. Thompson*, 337 U.S. 163, 172.

2. *The Minnesota supreme court has decided erroneously a federal question of widespread and continuing importance.*—The state court's first opinion plainly construes and applies the Civil Air Regulation § 60.2 to impose an absolute duty on the pilot in command without the showing of any fault on his part. The decision is without warrant or even purported precedent. It construes § 60.2 to make the "pilot in command" the insurer of all persons during flight, whether a member of the crew, mere passenger, or as here, a pilot actually at the controls or potential power to operate the controls. In thus construing §60.2 to pre-

scribe absolute duty with resulting correlative rights, the state court has encroached upon the regulatory function as well as the enforcing function of the federal administrative agencies.

By its clear language, the section does no more than place final authority and responsibility for the operation of the aircraft in the "pilot in command." It purports to set up no standard of care and spells out no measure of the duty. The standards and duties imposed can be found only by reference to other sections of the Civil Air Regulations under the Civil Aeronautics Act of 1938, continued in effect under the Federal Aviation Act of 1958. But the state court cites no such section and makes no suggestion of evidence permitting inference that defendant's check pilot breached any of the federal regulations. Under the state court's decision, a pilot in command using the air-space over Minnesota is, as a matter of federal law, subject to a different duty—that of insurer against negligent operation by any other person, including, as in this case, guarantee to a pilot, who was properly at the controls in carrying out the purpose of the flight, against his own negligence. This, without breach by the pilot-in-command of any Civil Air Regulation and without showing of any negligent conduct on his part.

3. *The decision below is in conflict with the decisions of the Civil Aeronautics Board construing its own regulations.* —The decisions of the Civil Aeronautics Board make it clear that the Civil Air Regulations promulgated by it do not impose on the pilot in command any absolute duty imputing to him, in the operation of the aircraft, the negligence of other pilots or crew members. The C.A.B. holds that the duty of the pilot in command may be found to have been breached only upon evidence of his negligence in failing to exercise the "highest degree of care" reasonably to be expected under the circumstances, of a reasonable, prudent pilot.

Preliminarily, it should be noted that the Board has repeatedly held that the duties imposed under the regulations are not absolute but require the "highest degree of care." *C. J. Chambers*, 28 C.A.B. 824 (1958).

The interpretation of the responsibility of a pilot in command imposed by the Civil Air Regulations placed thereon by the Civil Aeronautics Board, and the conflict therewith of the Minnesota court's construction is apparent from the following:

Smith, Airman Certificate, 13 C.A.B. 117 (July 18, 1947). After collision September 26, 1945, of a T.W.A. Chicago-Kansas City scheduled cargo flight with a flying club aircraft just outside of Chicago, both pilots of the T.W.A. aircraft, Smith and Reier, were charged with careless and negligent failure to keep a look-out. Reier, the second pilot, who was on the right and failed to see the colliding aircraft approach from that side, withdrew his exceptions to the examiner's report. The Board held (p. 120):

> "We come now to one of the most important safety problems with which pilots and operators must cope and which this case points up. Wherever there are two or more pilots on duty in the aircraft it immediately raises the question as to which of the pilots shall perform each of the functions that must be performed. The function in which we are primarily interested in this case is that of maintaining a lookout. An examination of the record does not disclose that the company has established any rules or pattern for the two pilots to follow with respect to their respective duties. It further discloses that the pilots themselves had not expressly formulated any procedure for the placing of responsibility to maintain a lookout. The results of this failure are illustrated in this case.
>
> "Respondent Smith was the first pilot, and as such the pilot in command of the aircraft. *His responsibility for the safe operation of the aircraft is fixed by the Civil Air Regulations and is one which he cannot delegate. This responsibility requires that the*

pilot take all reasonable precautions to avoid accidents, and his failure to do so subjects him to disciplinary action under the Civil Aeronautics Act of 1938. In this case Captain Smith failed to maintain a proper lookout himself or to have any effective arrangement for his copilot to insure the maintenance of such lookout. *Such failure was negligence on the part of Captain Smith.* We do not need to impute the negligence of Respondent Reier to Smith, and *disagree with the conclusion of Examiner Davis that such negligence could be imputed to Captain Smith.* (Emphasis supplied)

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[1] The footnote cites Sections 60.100, 61.510 and 61.7800. Section 60.100 of the Air Traffic Rules as adopted by the C.A.B. April 26, 1945, effective July 1, 1945 (10 Fed. Reg. 5066 (May 8, 1945)) provided:

> "§ 60.100. *Authority of pilot.* The pilot in command of an aircraft shall be directly responsible for its safe operation."

Chapter 61, "Scheduled Airline Rules (Interstate)", as promulgated by the Secretary of Commerce under authority of the Air Commerce Act of 1926, September 28, 1937 (2 Fed. Reg. 2014, 2047) and adopted by the Civil Aeronautics Authority August 20, 1938 (3 Fed. Reg. 2051, 2052), included the following:

> "61.51. *First Pilot.*
>
> "61.510. Aircraft Commander—The first pilot shall be in command of the aircraft at all times during flight and shall be responsible for the safety of persons and goods carried and for the conduct and safety of the members of the crew."
>
> "61.78 *General Pilot Rules*
>
> "61.7800. Command of Flight—the first pilot shall be in command during the flight of the aircraft"

The above language was quoted with approval by the C.A.B. in *Kuhn, Airman Certificate*, 13 C.A.B. 139, 142 (Feb. 4, 1949).

In *Charles A. Hazen*, 26 C.A.B. 824 (1958) the examiner imputed to the pilot in command of a scheduled air trans-

port the negligence of the flight engineer in failing to discover, in the course of his customary interstation inspection, that a wing had been damaged. As a result, he charged the pilot in command with flying the plane while unairworthy, contending, as did the Minnesota court, that the pilot in command is "responsible for the actions of all the crew members aboard the aircraft and is accountable for the failure of any of them to properly carry out their duties" (p. 829). Rejecting this theory of imputed negligence, the Board held (p. 829)

> "We cannot agree with the examiner's interpretation as to the extent of the liability of a transport commander for the action of his crew * * * nor with his finding that the evidence is sufficient to support a charge of a section 40.60 violation ["No air carrier shall operate any airplane in scheduled operation unless such airplane . . . is in an airworthy condition."] by respondent. *The evidence fails to show that respondent knew, or in the exercise of reasonable care, should have known* that the aircraft was in an unairworthy condition when it was flown from Mobile to New Orleans. Nor was any evidence submitted to establish that respondent *in the exercise of his duties as a reasonable and prudent airline transport pilot* should not have relied upon the flight engineer to properly carry out the functions assigned to him."[10] (Emphasis supplied)

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[10] The cogency of these late, conflicting decisions is more apparent when regard is had for the relationship of the different parts and sections of the Civil Air Regulations (14 C.F.R. (rev. 1956)).

Certain parts are applicable to all aircraft operations: The "Air Traffic Rules" (Part 60) "apply to aircraft operated anywhere in the United States, including the several states (§ 60.1). The "General Operation Rules (Part 43) "govern the operation of civil aircraft in the United States" (§ 43.1). Thus the general provisions of Parts 43 and 60 apply to all aircraft operation, including Scheduled Air Carriers as to which additional regulations are prescribed by Part 40 ("Scheduled Interstate Air Carrier & Operation Rules") and Irregular Air Carrier as to which additional regulations are prescribed by Part 42 ("Irregular Air Carrier and Off-Route Rules").

In the same case the examiner proposed to hold the pilot in command negligent because of the negligence of his co-pilot in attempting a turn at too low an altitude after abandoning an landing approach when visibility proved insufficient. The Board found that the attention of the

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In Part 40 the following sections reemphasize the responsibility of the pilot-in-command:

"§ 40.5 *Definitions.* As used in this part terms shall be defined as follows:

• • • • • • • • • •

"*Pilot in command.* The pilot in command is the pilot designated by the air carrier as the pilot responsible for the operation and safety of the airplane during the time defined as flight time.

"§ 40.351 (c) *Responsibility of pilot in command.* The pilot in command. The pilot in command shall during flight time be in command of the airplane and crew and shall be responsible for the safety of the passengers, crew members, cargo, and airplane."

As to Irregular Air Carriers, Part 42 contains the following sections here pertinent:

"§ 42.1 *Definitions.* As used in this part the words listed below shall be defined as follows:

"*Pilot in command.* Pilot in command shall mean the pilot responsible for the operation and safety of the aircraft during the time defined as flight time.

§ 42.51. *Pilot responsibilities*—(a) *Pilot in command.* The pilot in command of the aircraft shall be designated by the air carrier.

§ 42.51-2. *Responsibilities of the pilot in command* (CAA *policies which apply to* § 42.51). In this addition to the responsibilities prescribed in this section, the pilot in command is responsible for:

(a) Safe and efficient conduct of the flight to which assigned;

(b) Proper performance of duties by other assigned members of the crew;

• • • • • • • • • •

pilot-in-command had been legitimately diverted for approximately four seconds to raise the landing gear and held (p. 828):

> "Under the facts and circumstances as they are presented in this record, and applying the standards of a reasonable, prudent pilot in respondent's position, and operating under the conditions respondent knew, or should have known them to be, we cannot find that respondent acted negligently or recklessly or failed to take all reasonable precautions in his operation of the aircraft during the first approach to Moisant airport,

In *William A. Thomas*, 29 C.A.B. 1493 (1959), involving alleged reckless operation by an airline transport pilot, the Board found it necessary to correct an overswing reaction to the *Hazen* decision and to clarify and reaffirm its holding therein. It said (p. 1495):

> "One other matter requires comment. Both the examiner and the respondent appear to believe that the Hazen case [7] precludes finding a pilot-in-command in violation of the Civil Air Regulations for incidents which occur while the copilot is actually manipulating the controls. The Hazen case stands for no such proposition. It merely provides that the facts dictate whether the pilot-in-command can be held responsible for violation of the Civil Air Regulations while the copilot is actually manipulating the controls. . . . As indicated, the Board's decision in the Hazen case was made on the basis of the facts of record. In making its decision the Board applied 'the standard of a reasonable, prudent pilot in respondent's position, and operating under the conditions respondent knew, or should have known them to be. . . . Such is the standard the examiner must apply to the facts of record in the instant case in order to determine whether the respondent in this case is in violation of the regulations."

The C.A.B. decisions, taken separately or together, thus clearly spell out the uniform construction by that Board of its own regulations: The duty or responsibility of the pilot-in-command of an aircraft to "be responsible for its

operation" (under § 60.2 of the general "Air Traffic Rules"), or of a pilot-in-command of an aircraft of a scheduled air carrier to be responsible for the "safety of the passengers, crew members, cargo, and airplane" (under § 40.351(c) of the "Scheduled Interstate Air Carrier Certification and Operation Rules") or of pilot in command of a transport to be responsible for the "safe and efficient conduct of the flight" (under § 42.51-2 of the "Irregular Air Carrier and Off-Route Rules") all parts of the Civil Air Regulations, is uniform: To use the highest degree of care in discharging the functions of a reasonable, prudent pilot in the position and under the conditions as he knows them or should have known them to be.

Equally important, these decisions, in two instances at least, have specifically rejected the rule of imputed and absolute liability for negligence of others that the state supreme court purported to find prescribed by § 60.2.

Two very recent decisions of the C.A.B. hold that a pilot may, by taking over the controls and assuming the function of pilot-in-command during the course of the flight, thereby become subject to the duties and responsibilities of a pilot in command de facto. These emphasize the fatuous nature of the state court's expedition into interpretation and application of the federal Civil Air Regulations. The state court held that as to the possible contributory negligence of the plaintiff's decedent, its rule of imputed negligence of the pilot-in-command could not apply to the decedent because "No such principle is applicable to the person being carried as a passenger regardless of whether or not he was an unlicensed trainee or a pilot on a checkout flight."[11] (App., *infra*, p. 16a.)

[11] The State court's statement that plaintiff's decedent was a "passenger" is so interrelated with the question of law as to be subject to independent re-examination by this court. *Kansas City So. Ry. Co.* v. *C. H. Albers Comm. Co.*, 223 U.S. 573, 591.

In *Ronald H. Conway*, Order No. S-1114 (June 8, 1962), CCH Av. Law Rep., Vol. 1A, para. 21,288, the second pilot of an irregular air carrier challenged the holding that he was responsible as pilot-in-command, urging that the other pilot had been the "designated" pilot in command. The Board held (p. 14,841):

> "Even had respondent established that Captain Greenlee was designated pilot-in-command, that circumstance would not ipso facto absolve respondent from responsibility for any careless and reckless operation of aircraft which occurred. If pilot-in-command functions are in fact exercised by a pilot holding an airline transport pilot rating, the fact that another pilot may have been designated as pilot-in-command does not preclude an evaluation of the former's qualifications to hold the rating or appropriate action with respect thereto on the basis of the command functions actually assumed and performed."

In *Robert J. Jones, Fred Scott*, Order No. S-1149 (August 1, 1962) CCH Av. Law Rep. Vol. 1A, para. 21,308, p. 14895, the pilot in command and pilot of a transport of an irregular air carrier were both charged with violation of sections 42.54 (flight into known heavy icing conditions) and section 60.12 (careless or reckless operation). They questioned that both could be found in violation since the regulations provide for only one pilot-in-command (p. 14899). The Board held (p. 14899):

> "It is quite true that there can be but one designated pilot-in-command during flight time and that Jones is occasionally referred to in the Initial Decision as the 'second Pilot-in-command.'[26] Nevertheless, under the circumstances here both respondents were properly found in violation of Sections 42.54 and 60.12.
>
> "As pilot-in-command, Scott's responsibility for the operation and safety of the aircraft during flight is fixed by Section 42.51 of the Civil Air Regulations. The flight into known icing conditions and the careless and reckless operation of the aircraft were violations of the Regulations for which he as pilot-in-command

bore ultimate responsibility, although he himself did not fly the aircraft from the left-hand seat occupied by Jones. [27] Jones' part in the conduct of the flight, on the other hand, was not restricted to flying the aircraft on Scott's orders and direction and pursuant to decisions made by Scott. It was, on the contrary, Jones himself who made the crucial decisions *with Scott's acquiescence* which resulted in the continuing violation of Regulations . . . The record establishes, accordingly, that Jones, as well as Scott, is responsible for the violations." (Emphasis supplied)

Since it is not plainly erroneous or inconsistent with section 60.2 of the Civil Air Regulations, the long-established interpretation by the C.A.B. of that section and of its substantially equivalent antecedents and analogues, all originally promulgated or adopted by the Board, is entitled to controlling weight. *United States* v. *Eaton*, 169 U.S. 331, 343; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

The jurisdiction of this Court should be exercised to cure the conflict.

4. *The objectives and purposes of the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958 require exercise by this Court of its certiorari jurisdiction to protect the substantive rights afforded by the federal legislation and regulations.*—The ever-increasing mobility and number of aircraft and their personnel bear witness to the wisdom of Congress in vesting the Civil Aeronautics Board and more lately the Federal Aviation Administrator with broad powers of uniform regulation on a national scale. The expertise of the C.A.B. and the C.A.A. enables it best to attain the proper balance between considerations of safety and economics essential to the safety and development of civil aeronautics (Cf. *American Airlines* v. *Air Line Pilots Association*, 91 F. Supp. 629). Both of these elements are set out as matters of public policy and considerations to be taken into account.

The purpose of the Federal Aviation Act of 1958 was to centralize in one authority the power to frame rules for the safe and efficient use of the nation's air space. *Air Line Pilots Association* v. *Quesada*, 276 F. 2d 892, 895, cert. denied 366 U.S. 962. Congress is presumed to have intended uniform and nationwide application of the regulations promulgated under both acts, without interference or impairment by action of the individual states. *United States* v. *Pelzer*, 312 U.S. 399, 403; *Seaboard Air Line* v. *Horton*, 233 U.S. 492, 503; *Jerome* v. *United States*, 318 U.S. 101, 104.

The regulation here involved, as interpreted by the Civil Aeronautics Board confers a right on the check pilot and his employer in that it imposes a duty of due care, in this instance the "highest degree of care", but does not impose any absolute duty to indemnify others, who may validly operate the aircraft, against their own negligence in such operation. The vice in the decision of the Minnesota court lies not merely in its application of a different liability or remedy under the law of Minnesota. By construing the federal regulation to eliminate the personal negligence concept and to impose on the pilot-in-command the absolute liability for any negligence in operation of the aircraft, the decision changes and impairs the substantive rights of pilots everywhere by this changed interpretation and construction of the federal regulation having the force of law.

To the extent that this decision is operative in Minnesota it abrogates the correct and uniform application of a federal regulation having the force of law in both state and federal courts. To prevent such disruption of uniform application of the federal regulations is a recognized ground for exercise of this Court's certiorari jurisdiction. *Brown* v. *Western R. of Alabama*, 338 U.S. 294, 295. Furthermore, one of the declared objectives of the jurisprudence of this Court is to assure litigants full protection for all substantive rights intended to be afforded them by the federal jurisdiction in which the right originates. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245.

When regard is had for the numerous fact situations where check pilots may participate in aircraft flights for the purpose of checking out certificated and presumably competent pilots who assume the controls, and when regard is had for the number of relationships in which one pilot may take over the functions and responsibilities of pilot or pilot in command during the course of a flight and in furtherance of the very purpose for which the flight is made, it is obvious that the number of persons affected by the decision here involved is large and the depressing economic effect on civil aeronautics is continuing and serious. The risks, and the economic burden of insurance against the risks, of aviation are still relatively great. The uncertainty created in the industry, particularly in plane rental companies, flying clubs and flying schools, together with the greater costs of adequate insurance against the increased potential liability that flows from the instant decision, imposes an oppressive and unwarranted burden on the growth of civil aeronautics.

CONCLUSION

It is, therefore, respectfully submitted that the above reasons amply justify favorable exercise of this Court's discretion to grant writ of certiorari to review the decision of the Minnesota Supreme Court.

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